Before the
Administrative Hearing Commission
State of Missouri

KCC CONTRACTOR, INC., and JOHN Q. HAMMONS INDUSTRIES, INC., Petitioners, vs. DIRECTOR OF REVENUE, Respondent.	))))))))))	No. 10-0539 RS

DECISION

KCC Contractor, Inc., and John Q. Hammons Industries, Inc. ("KCC" and "Hammons" individually, "Petitioners" collectively) are not entitled to a trade-in credit on their purchase of a 2007 Learjet 45XR airplane ("the 2007 Learjet"). Petitioners are liable for use tax, additions, and interest on the purchase.

Procedure

KCC filed a complaint on April 8, 2010, challenging the Director of Revenue's ("the Director") assessment of use tax, additions, and interest on the purchase of a one-half interest in the 2007 Learjet. We assigned case number 10-0539 RS to that case. The Director filed an answer on April 22, 2010. Hammons filed a complaint on November 16, 2010, challenging the Director's assessment of use tax, additions, and interest on the purchase of a one-half interest in the 2007 Learjet. We assigned case number 10-2199 RS to that case. The Director filed an

answer on December 29, 2010. The Director filed a motion to consolidate the two cases on February 14, 2011, which we granted. We assigned case number 10-0539 RS to the consolidated case.

On January 24, 2012, we placed the case in abeyance pending the outcome in the Supreme Court of Missouri of ***Loren Cook Co. v. Director of Revenue***, case number SC 93061. The Supreme Court issued its opinion in that case, affirming this Commission's decision in the Director's favor, on November 12, 2013. We ended the abeyance on January 2, 2014.

On February 3, 2015, the Director filed a motion for summary decision, accompanied by exhibits. Petitioners filed a response to the motion on March 9, 2015, and the Director filed a reply on March 24, 2015. We may grant a motion for summary decision if a party establishes facts that entitle that party to a favorable decision and no party genuinely disputes such facts. 1 CSR 15-3.446(6)(A). Facts must be established by admissible evidence such as affidavits or the adverse party's pleading or discovery response. 1 CSR 15-3.446(6)(B).

Findings of Fact

1. KCC and Hammons each owned an undivided 50% interest in a 2004 45XR Learjet ("the 2004 Learjet").

2. KCC and Hammons jointly owned KPA, LLC ("KPA").

3. On January 31, 2007, KPA entered into a purchase agreement ("the 2007 Learjet Purchase Agreement") with Learjet, Inc. ("Learjet") to purchase the 2007 Learjet for $10,600,000.00.

4. The 2007 Learjet Purchase Agreement allowed KPA to request a trade-in value for the 2004 Learjet up until 120 days prior to the delivery of the 2007 Learjet.

5. Learjet did not provide a trade-in value for the 2004 Learjet.

6. On December 13, 2007, KWAL, LLC ("KWAL")[1] tendered to KCC an offer to purchase the 2004 Learjet for $9,100,000.00.

7. KCC accepted KWAL's offer on December 14, 2007.

8. On December 18, 2007, KCC entered into a Qualified Exchange Accommodation Agreement for Replacement Aircraft ("the KCC-Virginia Agreement") with Virginia Air Exchange, Inc. ("Virginia"). Except for federal income tax purposes, Virginia acted as KCC's agent for all other federal, state, and local laws, including those pertaining to transfer, conveyance, excise, sales, and use taxes.

9. Virginia created a wholly owned subsidiary named VP 429, LLC ("VP 429"). VP 429 was designated as the titleholder of an undivided interest in the 2007 Learjet.

10. KCC intended to transfer its 50 % interest in the 2004 Learjet as part of an income tax-deferred, like-kind exchange under Section 1031 of the Internal Revenue Code and intended to acquire a 50 % interest in the 2007 Learjet as like-kind replacement property within the meaning and qualifying rules of Internal Revenue Code § 1031(a) and Treas. Reg. § 1.1031(a)-1.

11. The KCC-Virginia Agreement intended that Virginia, through VP 429, acquire an undivided 50% interest in the 2007 Learjet, hold the 2007 Learjet pending the transfer of the 2004 Learjet, and transfer a 50 % interest in the 2007 Learjet to KCC.

12. Once VP 429 acquired title to the 2007 Learjet and up to the time of the transfer of the 2007 Learjet to KCC, Virginia was to be treated as the beneficial owner of the 2007 Learjet for federal income tax purposes as provided under the Internal Revenue Code Procedures.

13. VP 429 entered into a Dry Lease Agreement where VP 429 leased the 2007 Learjet to KCC for a period of 180 days after the VP 429 took possession of the 2007 Learjet. The amount paid by KCC for leasing the 2007 Learjet was the greater of $10.00 or the interest due or

[1] Identified in the Director's motion for summary decision and Petitioners' response to the motion as "Kohl's." KWAL was identified in a "Statement of Registration of United States Civil Aircraft in the name of a Limited Liability Company" as a Wisconsin limited liability company whose sole member was Kohl's Pennsylvania, Inc.

payable to all lenders during or with respect to the term, including without limitation, all amounts due under any and all notes and mortgages.

14. On December 18, 2007, Hammons entered into a Qualified Exchange Accommodation Agreement for Replacement Aircraft ("the Hammons-Virginia Agreement") with Virginia. Except for federal income tax purposes, Virginia acted as Hammons' agent for all other federal, state, and local laws, including those pertaining to transfer, conveyance, excise, sales, and use taxes.

15. Virginia created a wholly owned subsidiary named as VP 430, LLC ("VP 430"). VP 429 was designated as the titleholder of an undivided interest in the 2007 Learjet.

16. Hammons intended to transfer its 50 % interest in the 2004 Learjet as part of an income tax-deferred, like-kind exchange under Section 1031 of the Internal Revenue Code and intended to acquire a 50 % interest in the 2007 Learjet as like-kind replacement property within the meaning and qualifying rules of Internal Revenue Code § 1031(a) and Treas. Reg. § 1.1031(a)-1.

17. The Hammons-Virginia Agreement intended that Virginia, through VP 430, acquire an undivided 50% interest in the 2007 Learjet, hold the 2007 Learjet pending the transfer of the 2004 Learjet, and transfer a 50 % interest in the 2007 Learjet to Hammons.

18. Once VP 430 acquired title to the 2007 Learjet and up to the time of the transfer of the 2007 Learjet to Hammons, Virginia was to be treated as the beneficial owner of the 2007 Learjet for federal income tax purposes as provided under the Internal Revenue Code Procedures.

19. VP 430 entered into a Dry Lease Agreement where VP 430 leased the 2007 Learjet to Hammons for a period of 180 days after the VP 430 took possession of the 2007 Learjet. The amount paid by Hammons for leasing the 2007 Learjet was the greater of $10.00 or the interest

due or payable to all lenders during or with respect to the term, including without limitation, all amounts due under any and all notes and mortgages.

20. On January 31, 2008, KCC and Hammons entered into an agreement to sell the 2004 Learjet to KWAL ("the 2004 Learjet Sale Agreement").

21. The purchase price in the 2004 Learjet Sale Agreement was $9,100,000.00.

22. The 2004 Learjet Sale Agreement required KCC and Hammons to remove the 2004 Learjet from the market and not offer to sell the 2004 Learjet to any entity other than KWAL.

23. Learjet, Inc., transferred title to an undivided 50% interest in the 2007 Learjet to VP 429 on January 2, 2008.

24. Learjet, Inc., transferred title to an undivided 50% interest in the 2007 Learjet to VP 430 on January 2, 2008.

25. On January 4, 2008, VP 429 and VP 430 registered the 2007 Learjet with the Federal Aviation Administration ("FAA").

26. On February 26, 2008, KCC entered into a Like-Kind Agreement ("the KCC-J.P. Morgan Like-Kind Agreement") with J.P. Morgan. The Agreement designated J.P. Morgan Property Exchange Inc. ("J.P. Morgan") as the Qualified Intermediary under Treas. Reg. § 1.1031(k)-1(g)(4).

27. J.P. Morgan did not hold title to either the 2004 Learjet or the 2007 Learjet. Title to the 2004 Learjet was conveyed from KCC to KWAL.

28. The KCC-J.P. Morgan Like-Kind Agreement designated J.P. Morgan as KCC's agent. The Agreement denied J.P. Morgan the right to possess, manage, control, rent, repair, maintain, or otherwise handle the 2004 Learjet or the 2007 Learjet.

29. On February 26, 2008, Hammons entered into a Like-Kind Agreement ("the Hammons-J.P. Morgan Like-Kind Agreement") with J.P. Morgan. The Agreement designated J.P. Morgan as the Qualified Intermediary under Treas. Reg. § 1.1031(k)-1(g)(4).

30. Title to the 2004 Learjet was conveyed from Hammons to KWAL.

31. The Hammons-J.P. Morgan Like-Kind Agreement designated J.P. Morgan as Hammons' agent. The Agreement denied J.P. Morgan the right to possess, manage, control, rent, repair, maintain, or otherwise handle the 2004 Learjet or the 2007 Learjet.

32. On March 3, 2008, KCC and Hammons signed the 2004 Learjet Bill of Sale to KWAL.

33. KWAL received delivery of the 2004 Learjet on March 3, 2008 at the Wichita Mid-Continent Airport in Wichita, Kansas.

34. KCC entered into an agreement with VP 429 ("the VP 429 Aircraft Sale Agreement") to transfer its undivided 50% interest in the 2007 Learjet to KCC. The purchase price was $5,300,000.00 payable in immediately available cash funds, plus KCC's assumption of any indebtedness encumbering the 2007 Learjet. The closing date of the VP 429 Aircraft Sale Agreement was to be on or about the 180th day following the date VP 429 took title of the 2007 Learjet.

35. Hammons entered into an agreement with VP 430 ("the VP 430 Aircraft Sale Agreement") to transfer its undivided 50 % interest in the 2007 Learjet to Hammons. The purchase price was $5,300,000.00 payable in immediately available cash funds, plus Hammons' assumption of any indebtedness encumbering the 2007 Learjet. The closing date of the VP 430 Aircraft Sale Agreement was to be on or about the 180th day following the date VP 430 took title of the 2007 Learjet.

36. On April 29, 2008, VP 429 executed a bill of sale for its undivided 50% interest in the 2007 Learjet to KCC.

37. On April 29, 2008, VP 430 executed a bill of sale for its undivided 50% interest in the 2007 Learjet to Hammons.

38. KCC and Hammons filed an Aircraft Registration Application for the 2007 Learjet on April 29, 2008.

39. At no time during the above-stated events did Learjet, Inc., take the 2004 Learjet in trade as a credit or partial payment on the purchase price of the 2007 Learjet.

40. On February 16, 2010, the Director assessed use tax in the amount of $560,000.00, additions to tax in the amount of $28,000.00, and statutory interest in the amount of $30,546.83 against KCC for the tax period October 1, 2008 through December 31, 2008, for a total of $618,546.83.

41. On September 24, 2010, the Director assessed use tax in the amount of $560,000.00, additions to tax in the amount of $140,000.00, and statutory interest in the amount of $61,778.80 against Hammons for tax period October 1 through December 31, 2008 for a total of $761,778.80.

42. KCC filed quarterly use tax returns for January 1 through March 31, 2008, April 1 through June 30, 2008, July 1 through September 30, 2008, and October 1 through December 31, 2008.

43. Hammons failed to file use tax returns in 2008.

44. KCC did not amend the use tax returns it filed for 2008.

Conclusions of Law

This Commission has jurisdiction over appeals from the Director's final decisions. Section 621.050.1.[2] Our duty in a tax case is not merely to review the Director's decision, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue. ***J.C. Nichols Co. v. Director of Revenue***, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

[2] Statutory references are to RSMo 2000 unless otherwise noted.

Construction of Statutes and Burden of Proof

Exemptions from taxation are to be construed strictly against the taxpayer, allowed only upon clear and unequivocal proof, and any doubt is resolved in favor of application of the tax. ***AAA Laundry & Linen Supply Co. v. Director of Revenue***, 425 S.W.3d 126, 128 (Mo. banc 2014). However, taxing statutes, especially those which impose penalties, are to be strictly construed against the taxing authority and in favor of the taxpayer. ***Hewitt Well Drilling & Pump Service, Inc. v. Director of Revenue***, 847 S.W.2d 795, 799 (Mo. banc 1993).

Petitioners have the burden to prove that they are not liable for the amount that the Director assessed. Section 621.050.2.[3]

Petitioners' Claim to the Exemption of § 144.025.1

Petitioners argue that they are entitled to an exemption from use tax under § 144.025.1 RSMo Supp. 2013, which provides in relevant part:

> Notwithstanding any other provisions of law to the contrary, in any retail sale…where any article on which sales or use tax has been paid, credited, or otherwise satisfied or which was exempted or excluded from sales or use tax is taken in trade as a credit or part payment on the purchase price of the article being sold, the tax imposed by sections 144.020 and 144.440 shall be computed only on that portion of the purchase price which exceeds the actual allowance made for the article traded in or exchanged, if there is a bill of sale or other record showing the actual allowance made for the article traded in or exchanged.

Petitioners argue that the 2007 Learjet was taken in trade for the 2004 Learjet; thus, they claim, they only owe tax on the difference between the purchase prices of the two airplanes.

[3] Section 136.300 also imposes a general burden of proof on the taxpayer in tax cases. However, at all relevant times, subsection 2 of that statute (RSMo 2000) read, "This section shall not apply to any issue with respect to the applicability of any tax exemption or credit." Because the first of the two issues in this case is whether the Petitioners are entitled to the exemption of § 144.025, we do not apply that statute there, but do apply it below under "Additions."

The Supreme Court's Opinions in ***Great Southern Bank*** or ***Loren Cook Co.***

The Supreme Court has issued two opinions (***Great Southern Bank v. Director of Revenue***, 269 S.W.3d 22 (Mo. banc 2008), and ***Loren Cook Co. v. Director of Revenue***, 414 S.W.3d 451 (Mo. banc 2013)) in cases that the parties acknowledge are similar to this one. In both cases:

- the taxpayer sought to sell an airplane it owned and buy another airplane;
- the buyer of the first airplane and the seller of the second airplane were different parties;
- the parties used a "qualified intermediary" to handle the transaction;
- the transaction was structured in this manner to enable the taxpayer to take advantage of the "like-kind" tax deferral provisions of Internal Revenue Code § 1031; and
- the taxpayer claimed that it was entitled to the "taken in trade" exemption of § 144.025.1.

Great Southern Bank, 269 S.W.3d at 24; ***Loren Cook Co***., 414 S.W.3d at 452.

This case has all of those features. Petitioners sought to sell the 2004 Learjet to one party (KWAL) and buy the 2007 Learjet from another party (Learjet, Inc.); there was a qualified intermediary (J.P. Morgan) handling the transaction; the transaction was structured as a § 1031 exchange;[4] and Petitioners argue that they are entitled to an exemption under § 144.025.1.

To be sure, this case has parties for whom there are no counterparts ad in ***Great Southern Bank*** or ***Loren Cook Co***.; the LLC (KPA, LLC) jointly owned by the Petitioners; the Petitioners' agent for the transaction (Virginia); and the two LLCs (VP 429 and VP 430) created by Virginia, all of whom participated in the transaction. However, the Petitioners do not argue that these parties' presence in the transaction distinguish it in any way from those cases, and the presence

[4] "A § 1031 exchange permits a seller of certain types of property to defer taxation of any capital gain in the sale by reinvesting the sales proceeds in property of a like kind." ***Rivermont Village, Inc. v. Preferred Land Title, Inc***., 371 S.W.3d 858, 860 n.1 (Mo. App. S.D. 2012), *citing* ***Vest v. Kansas City Homes, L.L.C***., 288 S.W.3d 304, 308 n. 5 (Mo. App. W.D. 2009). KCC and Hammons structured the transaction in this case to defer federal capital gains tax. *See* Findings of Fact 10 and 16 above.

of those parties does not change the transaction's basic nature from that described in ***Great Southern Bank*** and ***Loren Cook Co***.

In fact, Petitioners cite ***Great Southern Bank*** in support of its argument as defining "trade" as "to give in exchange for another commodity." However, that was only the first sentence of the Supreme Court's analysis of what constitutes a "trade" for purposes of § 144.025.1. The entire paragraph says:

> The word "trade" means "to give in exchange for another commodity." The word "exchange" means "the act of giving or taking one thing in return for another," or "the process of reciprocal transfer of ownership (as between persons)." *A "trade," then, requires that the parties each have title to or ownership of their respective items and then exchange them.*

269 S.W.3d at 25 (Emphasis added and internal citations omitted).

The Court describes the exemption created by § 144.025.1 as the "taken in trade" exemption. *Id.* From there, it analyzed the transaction between the taxpayer and the other participants in it and concluded that the aircraft the taxpayer bought was not "taken in trade" for purposes of the statute because there was no exchange of aircraft, and therefore there was no trade. *Id.*

The ***Loren Cook Co***. opinion relies on ***Great Southern Bank***, rejecting the taxpayer's attempt to distinguish the two cases on the ground that in that case, the qualified intermediary actually took title to the two planes before making the transfers of each to their ultimate owners. 414 S.W.3d at 454. The Court cites ***Great Southern Bank***'s holding that "[w]hen determining the merits of revenue cases, it is important to look beyond legal fictions ... to discover the economic realities of the case." *Id., citing* ***Great Southern Bank***, 269 S.W.3d at 25. In both

cases, the Court noted, the economic reality was that the taxpayer sold one airplane and bought another, using a qualified intermediary to obtain the tax deferral offered by IRC § 1031. *Id.*

Here, the Petitioners also invite us to look beyond the legal fictions to the economic realities of the case, arguing that the reality was that KCC, Hammons, and J.P. Morgan took part in one transaction. However, that "reality" ignores the other parties whose participation was required to consummate the transaction—KWAL, the buyer of the 2004 Learjet, and Learjet, Inc., the seller of the 2007 Learjet, and more specifically that Petitioners were buying one plane from Learjet, Inc., and selling another plane to KWAL.

Ultimately, what this transaction did not have was what the Supreme Court said was required under § 144.025.1— that "the parties each have title to or ownership of their respective items *and then exchange them*." ***Great Southern Bank***, 269 S.W.3d at 25 (emphasis added). In that case, the Court pointed out that Wachovia, the qualified intermediary, could not keep either aircraft, nor could it sell the Beechcraft to anyone besides Jet I, and it did not take the Beechcraft in trade for anything. Instead, as the Court pointed out, neither Wachovia nor anyone else took any aircraft in trade, which is what the statute expressly requires ("where any article on which sales or use tax has been paid, credited, or otherwise satisfied or which was exempted or excluded from sales or use tax is *taken in trade* as a credit or part payment on the purchase price of the article being sold…."). *Id*. Accordingly, we follow the Supreme Court's interpretation of § 144.025.1 in ***Great Southern Bank*** and ***Loren Cook*** and conclude that Hammons and KCC did not qualify for the "taken in trade" exemption of § 144.025.1.

<u>The taxpayers do not qualify for the separate sale reduction clause of § 144.025.1 because it is limited to motor vehicles, trailers, boats, and outboard motors</u>

In ***Loren Cook***, 414 S.W.3d at 454, the Supreme Court also raises another reason for denying the relief the taxpayer sought. The next-to-last sentence of § 144.025.1 provides an exemption for a particular class of transaction, as follows:

> This section shall also apply to motor vehicles, trailers, boats, and outboard motors sold by the owner or holder of the properly assigned certificate of ownership if the seller purchases or contracts to purchase a subsequent motor vehicle, trailer, boat, or outboard motor within one hundred eighty days before or after the date of the sale of the original article and a bill of sale showing the paid sale price is presented to the department of revenue at the time of licensing.

The Court referred to this provision as "the separate sale reduction" provision, so-called because it allows for a party selling one motor vehicle (or trailer, boat, or outboard motor) in one transaction, then buying another motor vehicle (or trailer, boat, or outboard motor) by a separate sale, to reduce taxable amount of the purchase price of the item bought by the sale price of the item the party sold, if the party performs both transactions within 180 days of each other.

In this case, Petitioners sold the 2004 Learjet to KWAL no later than March 3, 2008 (the date they signed the bill of sale and delivered the plane to KWAL), and bought the 2007 Learjet from Learjet, Inc., no later than April 29, 2008 (the date VP 429 and VP 430 executed bills of sale conveying the plane to Petitioners). Accordingly, because those transactions occurred within 57 days of each other, their timing met the 180-day requirement of the separate sale reduction clause provision.

However, as the ***Loren Cook Co.,*** opinion points out, "[a]ircraft…are not listed as one of the types of property entitled to the exemption." 414 S.W.3d at 454. And, as the opinion also points out:

> If the legislature intended to include the sale of aircraft by an owner in the separate sale reduction provision, it could have done so. The fact that it did not indicates that when a taxpayer sells an already-owned aircraft separately from the purchase of a new aircraft, the taxpayer is not entitled to the trade-in exemption, regardless of the use of an intermediary.

Id. at 454-55. The separate sale reduction provision applies only to the purchase of a motor vehicle, trailer, boat, or outboard motor. For all other items, the general rule of § 144.025.1 applies— the item must be *taken in trade* to qualify for the exemption— which did not occur here, just as it did not occur in ***Great Southern Bank*** or ***Loren Cook Co***. Accordingly, Petitioners are not entitled to an exemption under § 144.025.1, and owe use tax and statutory interest.

Additions

Statutory Framework

Section 144.665.1[5] provides:

> In case of failure to file any return required under sections 144.600 to 144.745 on or before the date prescribed therefor (determined with regard to any extension of time for making a return), unless it is shown that such failure is due to reasonable cause and not the result of willful neglect, evasion, or fraudulent intent, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is not for more than one month, with an additional five percent for each additional month, or fraction thereof, during which such failure continues, not exceeding twenty-five percent in the aggregate; except that, when the gross sales tax exceeds two hundred fifty dollars in any one month for which a taxpayer must file a monthly return, there shall be no late penalty assessed for the first month in which the return is due. For purposes of this section, the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax.

Section 144.665.2 is a penalty statute. ***Hewitt Well Drilling***, 847 S.W.2d at 798. Accordingly, we construe it strictly against the Director. *Id.* at 799.

Also, as we state above, § 621.050.2 imposes the burden of proof on Petitioners. That statute provides in relevant part:

[5] The Director cites § 144.250.1 as the statute imposing an addition to tax. That statute begins, "In case of failure to file any return required under *sections 144.010 to 144.525*…." (Emphasis added.) The returns (or amended returns, as discussed below) allegedly required to be filed by Petitioners were use tax returns, which are required under § 144.655.

> In any proceeding before the administrative hearing commission under this section the burden of proof shall be on the taxpayer except for the following issues, as to which the burden of proof shall be on the director of revenue:
>
> > (1) Whether the taxpayer has been guilty of fraud with attempt to evade tax;
> >
> > (2) Whether the petitioner is liable as the transferee of property of a taxpayer (but not to show that the taxpayer was liable for the tax); and
> >
> > (3) Whether the taxpayer is liable for any increase in a deficiency where such increase is asserted initially after the notice of deficiency was mailed and a protest filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported by the taxpayer, and of which change or correction the director of revenue had no notice or knowledge at the time he mailed the notice of deficiency.

And, at all relevant times, § 136.300 read in relevant part:

> 1. The director of revenue shall have the burden of proof with respect to any factual issue relevant to ascertaining the liability of a taxpayer only if:
>
> > (1) The taxpayer has produced evidence that establishes that there is a reasonable dispute with respect to the issue; and
> >
> > (2) The taxpayer has adequate records of its transactions and provides the department of revenue reasonable access to these records; and
> >
> > (3) In the case of a partnership, corporation or trust, the net worth of the taxpayer does not exceed seven million dollars and the taxpayer does not have more than five hundred employees at the time the final decision of the director of the department of revenue is issued.
>
> 2. This section shall not apply to any issue with respect to the applicability of any tax exemption or credit.

Petitioners' Argument for Good-Faith Belief, Based on Prior Transaction(s)

Citing ***Hewitt Well Drilling*** among other cases, Petitioners argue that they should not be liable for additions to tax because they did not act with willful neglect. That lack of willful neglect was shown, they argue, by their good-faith belief that no such tax was due. Petitioners' reasoning, they argue, "was based on the DOR's treatment of similar transactions in previous years. Since the DOR did not assess additional use tax in previous years' transactions,

Petitioner[s] made a good-faith assumption that the year at issue would not be different." Petitioners' Response to Respondent's Motion for Summary Decision p. 11.

While Petitioners did not identify in their argument what "similar transactions" it was referring to, we believe they refer to a 2004 transaction in which KPA bought the 2004 Learjet. Their version of the transaction is set out in an affidavit from Benny Nale, chief financial officer of KCC. Nale's affidavit states:

- In 2004, [KPA] sold [a] BeachJet (sic) 400A for $3,912,000 and purchased a Learjet 45 for $10,107,000;
- [KPA] paid use tax net of the trade in allowance for the 2004 transaction in the amount of $389,555; and
- [The Director] conducted an audit of [KPA]'s financials, including the 2004 transaction. [The Director] confirmed [KPA]'s tax liability calculations, and did not assess any additional use tax or additions to tax.

In response, the Director provided an affidavit from Timothy Bertalott, an audit supervisor for the Director who, he testified, audited KPA for use tax for the period October 1, 2002 through December 31, 2004. He attached a copy of the audit summary report, which described the transaction as follows:

> In April 2004, a Learjet was purchased from Learjet Inc. for $10,195,000.00 less $4,000,000.00 trade-in for the Beechjet. [KPA] claimed to have believed that tax was included in the purchase price. [KPA] contacted Learjet and were told in certain terms that the price did not include tax. The contract indicates that the jet was picked up at the seller's facility in Tucson, Arizona. Use tax is being held on this item.

Nale's audit, and Petitioners' argument, suggests that this transaction was actually two transactions, just as the purchase of the 2007 Learjet and the sale of the 2004 Learjet were two transactions. The Director's audit summary report, however, asserts that the trade-in of the Beechjet reduced the cost of the 2004 Learjet by the trade-in amount. Nale's affidavit also says nothing about paying the tax only after the audit, as reflected by the report.[6]

What is Required to Prove Absence of Willful Neglect

In ***Hewitt Well Drilling***, this Commission concluded that the taxpayer was liable for penalties because it had not shown reasonable cause for failing to file use tax returns. 847 S.W.2d at 798. On review, the Supreme Court noted that because we reached that conclusion, we "did not reach what [we apparently did not perceive] to be a second issue of willful neglect." *Id.* at 798-99. That failure to consider willful neglect, the Court held, constituted reversible error. Instead, the Court held that "[the] inquiry [in this situation] is whether the taxpayer can show the absence of 'willful neglect,' rather than presence of 'reasonable cause.'" *Id.* at 799. In ***Hewitt Well Drilling***, the taxpayer presented specific evidence that:

- its president knew of no other well drillers that paid use tax on drilling rigs;
- the president believed that his purchase of the drilling rig in question was subject to, but exempt from, motor vehicle use tax, as opposed to consumer use tax;
- the Director's agent told the president that Hewitt need not pay motor vehicle use tax on the drilling rig;
- since the president assumed that office within the company, the company had acquired two drilling rigs, and the Director never assessed use tax on the first two such rigs; and

[6] Because the parties' versions of this transaction differ in the ways set out here, we adopt neither version, nor any facts relating to the transaction, in our findings of fact.

- the family that owned the company had been in the well drilling business and never paid sales or use tax on the purchase of drilling rigs.

Findings of fact 5-6, ***Hewitt Well Drilling & Pump Serv., Inc. v. Director of Revenue***, No. 91-001443RV (Missouri Administrative Hearing Comm'n, Apr. 30, 1992), at *1. The Court found this was sufficient.

Soon after the Supreme Court released its opinion in ***Hewitt Well Drilling***, it released its opinion in ***Conagra Poultry Co. v. Director of Revenue***, 862 S.W.2d 915 (Mo. banc 1993), in which it applied the sales tax version of the penalty statute, § 144.250.2. There, Conagra showed its lack of willful neglect by presenting evidence that it paid sales tax on some purchases of wood shavings, and that its treatment of the wood shavings in Missouri was consistent with its treatment of wood shavings in other states. *Id.* at 919. The Court held that by doing so, Conagra had shown its absence of willful neglect. *Id.* at 918.

Petitioners Failed to Prove the Absence of Willful Neglect

As shown above, under both §§ 136.300 and 621.050.2, as well as ***Hewitt Well Drilling*** and ***Conagra Poultry***, the taxpayer has to *prove* (under the statute) or *show* (under the case law) the absence of willful neglect. In this case, however, Petitioners did neither. Instead, while claiming that they relied on multiple, similar "transactions" on which they relied, they offered only their version of a single transaction in which they bought the 2004 Learjet. More importantly, the Director's response, including Bertalott's affidavit and the 2004 audit summary report, sufficiently contradicts Petitioners' version of that transaction so as to cast doubt on Petitioners' version.

Therefore, because that version of the 2004 Learjet transaction is the only thing Petitioners pointed to that they relied on to support their position, they have failed to meet their burden to show an absence of willful neglect, and they are liable for statutory additions to tax.

Summary

Petitioner KCC Contractor, Inc., is liable for $560,000.00 in use tax, $28,000.00 in additions, and statutory interest.[7] Petitioner John Q. Hammons Industries, Inc., is liable for

[7]Sections 144.170 and 144.720.

$560,000.00 in use tax, $140,000.00 in additions to tax, and statutory interest. We cancel the hearing.

SO ORDERED on April 1, 2015.

\s\ Nicole Colbert-Botchway
NICOLE COLBERT-BOTCHWAY
Commissioner